Washington State Court of Appeals
Division II

Docket No. 50285-2-II

Consolidating

Lewis Cy. Sup. Ct. Cause No. 16-1-00773-7 (Ware)

IN RE THE PETITION TO CONVENE A GRAND JURY, BARNES MICHAEL WARE,

Petitioner-Appellant.

with

Lewis Cy. Sup. Ct. Cause No. 17-2-00013-21 (Johnson)

IN RE THE APPLICATION FOR A CITIZEN COMPLAINT, ERIKA JOHNSON, PETITIONER

Petitioner-Appellant.

APPELLANTS' APPEAL BRIEF

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Issues Pertaining to Assignments of Error

A. Did Lewis County Superior Court Judge Andrew Toynbee err finding that CrRLJ 2.1(c) was unconstitutional facially and as applied?

B. Did Judge Toynbee err in finding that the statutory prosecutorial factors did not warrant the filing of criminal charges as petitioned?

III. OVERVIEW

On April 28, 2016, in Centralia, Wash., adults Richard Allshouse, Kyle B. Burke, and Tina Miller directly, and as part of a criminal conspiracy and/or in the role of an accomplice, allegedly committed felony and gross misdemeanor crimes in the course of taking, willfully injuring, willfully killing, maliciously damaging,

and/or cruelly mistreating Baby Jay, a domesticated feline owned by Alicia Schroeder. Declarations from numerous minor (Kyla Bowen, Illyleanna Gonzalez, Selena Velazquez, Elijah Bowen) and adult (Alicia Schroeder) witnesses, law enforcement personnel (CPD Officer William D. Phipps, Erika Johnson), and an expert witness (Victoria Smith, DVM), furnished a surfeit of evidence (as more fully described in the *Petition* and *Reply*) proving that:

- Burke committed First-Degree Animal Cruelty (RCW 16.52.205(1)) by inflicting substantial pain on and/or causing physical injury to Baby Jay by stabbing him in the head;
- Burke committed Second-Degree Animal Cruelty (RCW 16.52.207(1)) by stabbing Baby Jay in the head;
- Miller committed Second-Degree Animal Cruelty (RCW 16.52.207(1)) by twice dropping/throwing Baby Jay from a height of at least nine feet to the ground;
- Miller committed Taking Pet Animal (RCW 9.08.070(1)(a)) by twice taking possession of Baby Jay with intent to deprive the Schroeder family of him;
- Burke committed Injuring/Killing Pet Animal (RCW 9.08.070(1)(c)) by plunging the knife into Baby Jay's head in an effort to deprive the Schroeder family of any opportunity to provide him veterinary care or save Baby Jay's life;
- Burke committed Third-Degree Malicious Mischief (RCW 9A.48.090(1)(a)) in the act of ramming the blade through his skull and into Baby Jay's brain;
- Miller entered into a criminal conspiracy (RCW 9A.28.040) with her

daughter E.M. to commit Second-Degree Animal Cruelty by, with intent that conduct constituting a crime be performed, agreeing to engage in or cause the performance of such conduct, and either or both took a substantial step in pursuit of such agreement to knowingly, recklessly, or with criminal negligence inflict unnecessary suffering or pain upon Baby Jay;

- Miller also entered into a criminal conspiracy with E.M. to commit Taking Pet Animal;

- Miller was an accomplice (RCW 9A.08.020(1)) to E.M. committing Second-Degree Animal Cruelty by knowingly soliciting, commanding, encouraging, or requesting that E.M. commit it, or aiding or agreeing to aid her in planning or committing it;

- Miller also was an accomplice to E.M.'s committing Taking Pet Animals;

- Allshouse entered into a criminal conspiracy (RCW 9A.28.040) with Burke to commit Second-Degree Animal Cruelty when, with intent that conduct constituting a crime be performed, he agreed with Burke to engage in or cause the performance of such conduct, and either or both took a substantial step in pursuance of such agreement to knowingly, recklessly, or with criminal negligence inflict unnecessary suffering or pain upon Baby Jay;

- Allshouse also entered into a criminal conspiracy with Burke to commit Taking Pet Animal;

- Allshouse was an accomplice (RCW 9A.08.020(1)) to Burke's committing Second-Degree Animal Cruelty by knowingly soliciting, commanding, encouraging, or requesting that Burke commit it, or aiding or agreeing to aid him

in planning or committing it; and

- Allshouse was also was an accomplice to Burke's committing Taking Pet Animals and Third-Degree Malicious Mischief.

On December 21, 2016, Ms. Johnson, a veteran animal control officer, filed a CrRLJ 2.1(c) citizen criminal complaint petition in Lewis County District Court, seeking leave to file criminal charges against Burke, Miller, and Allshouse. On December 27, 2016, Mr. Ware, a retired lieutenant sheriff's deputy, filed a petition to empanel a grand jury in Lewis County Superior Court to obtain an indictment of Burke for felony animal cruelty.

As to Johnson's petition, both orally and in writing, the Lewis County Prosecuting Attorney's Office ("LCPAO") offered an almost entirely nonresponsive and deflective response. Instead of applying, much less referencing, any of the *five* statutes to the facts at issue, the LCPAO recited the tired refrain of what it considered the "biggest problem," inexplicably perseverating over the immaterial issue of "which injury caused the death of the cat," failing to appreciate that *none of the crimes* set forth in the petition required *any* proof of who killed Jay. What mattered, rather, were such issues as whether the Defendants, and each of them:

- Inflicted upon Baby Jay "unnecessary suffering or pain" (RCW 16.52.207(1));
- "T[ook], le[d] away, confine[d], secretes[d] or convert[ed] any pet animal" (RCW 9.08.070(1)(a));
- "Injure[d] any pet animal" (RCW 9.08.070(1)(c)); or

- "Cause[d] physical damage to the property of another" (RCW 9A.48.090(1)(a)).

The LCPAO also ignored the doctrines of conspiracy and accomplice liability, including that Allshouse egged Burke on, and, thereafter, took and hid the incident knife; and that Miller similarly encouraged her daughter to unlawfully dispossess the Schroeder family of Baby Jay and, in the process, drop him twice, causing undue suffering.

Disappointingly, and disturbingly, despite nearly half an hour of argument, Judge Buzzard devoted but a minute or two's attention to explaining his ruling, one where he did not specify whether he found probable cause or which, if any, of the CrRLJ 2.1(c) factors caused the court to decline any part of the multi-count petition. Ms. Johnson timely sought review of the court's adverse ruling. On April 21, 2017, Lewis County Superior Court Judge Toynbee deemed CrRLJ 2.1(c) unconstitutional facially and as applied. While he found that probable cause existed as to all potential defendants, he nonetheless affirmed the district court's dismissal of Ms. Johnson's petition citing prosecutorial declination factors.

As to Mr. Ware's petition, the LCPAO continued to elide the distinction that had been made obvious to everyone, repeatedly – i.e., who "killed" Jay was legally immaterial. It also argued that RCW 10.27.030 did not permit private citizen petitions. On April 21, 2017, the entire Lewis County Superior Court deemed RCW 10.27.030 unconstitutional as to private petitioners and dismissed Mr. Ware's petition.

This consolidated appeal calls upon this court to decisively stand with or

against the people of the State of Washington. Either it will nullify a Supreme Court rule and legislative enactment providing two important, long-standing avenues of private initiation of prosecution of misdemeanors and felonies, or it will honor and preserve them. The underlying facts of the ignominious death of Baby Jay follow.

IV. STATEMENT OF THE CASE

A. Kyla Bowen.

Thirteen-year-old Kyla Bowen, who at the time of the events complained of resided at 111 Virginia Dr., Unit G23, in Centralia, visited her friend, Selena Velazquez, on April 28, 2016. Selena lived with her mother Alicia Schroeder, and her siblings. In Selena's apartment, Kyla saw Jay, an adult, domestic longhaired, neutered male feline. He had just eaten dinner. CP 16 ¶¶ 1, 3. Selena let Jay out. Shortly thereafter, Kyla, Selena, and Illyleanna Gonzalez exited Schroeder's apartment. Kyla saw E.M. holding Jay without permission. Kyla asked her to put Jay down, that he was not her cat, and not to touch other's animals. E.M. obstinately refused. At no time did Jay try to scratch, bite, or attack E.M. until she handed him up to her mother, Tina M. Miller, the second time, as discussed more fully below. CP 16 ¶¶ 4-5.

Struggling as E.M. wrapped both her arms around Jay's stomach and ribs, Kyla heard a "popping noise" come from Jay. E.M. then ran around the complex, carrying Jay as he wrestled to get free. Kyla followed E.M. and continued to tell her to put him down. E.M. refused. CP 16 ¶¶ 6-7. By this time, E.M. was standing beneath the balcony to her apartment, where she lived with Ms. Miller and would

see Kyle B. Burke, Ms. Miller's boyfriend. Kyla watched E.M. stretch to hand Jay up to her mother, who was on her balcony on her knees, reaching through the bars (spaced four inches apart) to take Jay from her daughter. CP 50 ¶ 8 (4" between bars of railing). Ms. Miller then dropped Jay. He fell approximately nine feet to the ground, striking firmly with a short cry. CP 16-17 ¶¶ 8-9; CP 50 ¶ 8 (12' from top of railing to ground).

At this point, Jay desperately squirmed to escape. Yet E.M. picked him up again and handed him up to Ms. Miller, who was laughing, along with Ms. Miller's friend and neighbor Nissa Whalen. E.M. was also amused. Mr. Burke was standing in Ms. Miller's doorway to the balcony, watching intently. At this point, Ms. Miller had a grip on Jay's neck for about ten seconds. When he struggled and tried to scratch E.M., Ms. Miller flung him to the ground. CP 17 ¶ 9.

E.M. then grabbed a large rock, which was a few feet from where Jay hit the ground, and forcefully dropped or threw it on his head, causing his blood to spray on the nearby wall. CP 17 ¶ 10. Kyla then ran to tell her mother, Samantha Riggen, what had happened. Before she left the area, Mr. Burke and another man, believed to be Richard Allshouse, were running down the stairwell with bloodlust, enthusiastic about who would get to stab Jay first. Kyla saw Mr. Burke carrying a knife. She asked the men what they were doing. One of them told her not to worry about it. CP 17 ¶ 11.

It should be noted that initially Kyla befriended E.M., her next-door neighbor, until Kyla's mother objected. E.M. had shown vicious propensities

before, having kicked Ms. Riggen's fiance's car and Alicia Schroeder's car and possibly harming her younger sister, Ava. CP 16 ¶ 2.

B. Elijah Bowen.

Seventeen-year-old Elijah Bowen, Kyla's brother, also resided at 111 Virginia Dr., Unit G23, in Centralia. On April 28, 2016, he was sitting in his bedroom watching the NFL draft when he heard his sister run up to the door screaming and crying, "They killed the cat!" CP 18 ¶¶ 1-2. He exited the residence, following others who were clearly agitated, running and screaming. He learned that two men came downstairs from an apartment and began to stab a cat with children watching. He was surprised and asked to be taken to the cat. CP 18 ¶¶ 3-4. He found Jay half-way under a cyclone fence trying to breathe, and still alive. Blood bubbles emerged from his mouth and nose. He was drenched in blood on his head, near his mouth, and somewhat on his torso. CP 18 ¶ 5.

C. Illyleanna Gonzalez.

Eleven-year-old Illyleanna Gonzalez was visiting Selena on April 28, 2016, where she saw Jay inside the Schroeder apartment, sated from a meal. CP 19 ¶¶ 1-2. After Jay was let out, she, Kyla, and Selena went outside. She saw E.M. holding Jay. She heard Selena ask her nicely to put him down. E.M. refused, saying she wanted to hold him. E.M. was squeezing Jay so hard he could not escape, though he tried. He could not breathe. CP 19 ¶ 3-4. Selena and Illyleanna ran back to notify Alicia Schroeder while Kyla followed E.M. to the common area behind the Miller apartment. Illyleanna told Alicia that E.M. would not give Jay back. CP 19 ¶¶ 5-6; CP 16-17. Illyleanna next witnessed two men running down

the stairs and pushing one another, as if in a race, saying eagerly, "I'm gonna do it!" They were in what seemed to be a competition to be the first to try to hurt Jay. CP 19 ¶¶ 6-7. She then saw a man stab a knife into Jay's body. Just before this moment, she saw his legs and head moving, and he was shaking a little to get away. He was next to the fence in the middle of the yard. CP 19 ¶ 8. When she asked what the men were doing, they told her not to worry about it. CP 20 ¶ 9.

D. <u>Selena Velazquez.</u>

Eleven-year-old Selena Velazquez lives with her mother Alicia Schroeder, her younger brother Armando, and toddler sister Mia at 111 Virginia Dr., Unit H26, in Centralia. CP 21 ¶ 1. Years ago Selena befriended E.M. when she moved in. Ms. Miller took them swimming one day. Inadvertently, Selena left her shirt at E.M.'s home, a short-sleeved, washed out, pink-colored shirt that said "I love you" on the front and "Sometimes" on the back.

Over their time together, E.M. would brag to Selena about shooting and killing wildlife when she hunted with her father. One day E.M. told her she was excited about getting a new gun. She showed Selena her mother's rifle and pistol, neither of which was in a gun safe. They were accessible to E.M. at any time, a grave concern given her temper. CP 21 ¶ 2. If she were upset, E.M. would throw items. Selena saw her throw locks at windows and houses. She also knew that her mother let her drive her motor vehicle. One day, E.M. got behind the wheel of Ms. Miller's car and drove it, damaging Schroeder's vehicle. When the police were called, Ms. Miller entered the driver's seat, trying to point the car out of the

area. CP 21 ¶ 2. Selena stopped playing with E.M. around the time Selena began to take care of Betty, a widow living in their apartment complex. CP 21 ¶ 2.

On April 28, 2016, around dinner, Selena was returning home from Betty's house. On the way, she encountered E.M., who was wearing the aforementioned shirt, and asked, "Can I please have my shirt back?" She responded, "No. I'm wearing it," followed by saying, "Fuck off" and giving her the finger. Selena ran back to her house. CP 21-22 ¶ 4. When Jay had finished eating, Selena let him out and watched to see where he went. She returned inside briefly until she heard Jay moaning. This prompted her to run outside to see E.M. with Jay in her arms, squeezing him. He never bit or scratched her, but tried in vain to get away. CP 22 ¶ 5. Selena demanded that E.M. put him down. E.M. refused. She then heard a pop from Jay's body and he briefly escaped her arms and ran by the fence. E.M. chased after him, stepped on his tail and grabbed him, again squeezing him as she ran around the side of the house. CP 22 ¶ 6. Panicked, Selena raced to her home and told her mother what was happening. She and Alicia burst outside. CP 22 ¶ 7.

Selena then saw Mr. Burke and Mr. Allshouse. They were laughing and excited about who would get to Jay. She distinctly heard one of them say that he would hurt "it" first. Selena asked what they were intending to do. They told her it was none of her business. Selena saw one of them pull out a knife. Mr. Burke then stabbed Jay. When he withdrew the knife, it was bloody. Mr. Burke told Mr. Allshouse, "Here, it's your turn" and handed the knife to him. While saying this, he was on his knee crouched over Jay. Mr. Allshouse took the knife and went

upstairs. E.M. then ran up to the apartment and was hidden. Meanwhile, Jay suffered in his last moments alive, as evidenced by him moving after being stabbed. CP 22 ¶¶ 8-10.

E. <u>Alicia Schroeder.</u>

Twenty-nine-year-old Alicia Schroeder cares for her daughter Selena, son Armando, and youngest daughter Mia, who named the cat "Baby Jay." Mia could not keep her hands off the feline. She loved him the first moment she set eyes on him. Below is a picture of Jay with Mia. CP 24 ¶¶ 1-2.

On April 28, 2016, Alicia fixed dinner when Selena, Illyleanna and Kyla came inside briefly. About ten minutes later, she noticed Jay was no longer in the house. While putting dishes away, the girls ran into the apartment screaming at the top of their lungs, "Emily is squeezing the cat!" CP 24 ¶ 3. The girls explained they heard a pop while E.M. was holding Jay and wanted her to run out and save him. When Ms. Schroeder exited the apartment and came around the building, she heard Mr. Burke and Mr. Allshouse running down the stairs laughing obnoxiously and with great excitement as to who would get to "it" first. As she turned the side

of the complex, she saw Mr. Burke bending down in a dirt pile, brandishing a knife, and watched him stab it into Jay's ear. She then watched him kick Jay under the fence. CP 24-25 ¶ 4. She exclaimed, "What the fuck are you doing!?" He ignored her and ran off.

Ms. Schroeder yelled to Ms. Miller, who was on the balcony watching with Nissa Whalen, to call the police. Ms. Miller looked down with an expression of disinterest, went inside, shut the door, and closed the windows. CP 25 ¶¶ 5-7. Kyla ran back to explain that her mother was on the phone with the police. Eli Bowen also arrived, observing Jay still animated after being stabbed. CP 25 ¶ 8. Ms. Schroeder also saw Jay jerking with bubbles frothing from his mouth, proof he was still alive. CP 25 ¶ 9.

Centralia police officers eventually appeared after much delay and arrested Mr. Burke. One of the officers told Megan Jensen, a friend and resident of the complex, to put Jay in a bag and then into the dumpster so children would not have to observe him. CP 25 ¶¶ 12-13.

Mr. Allshouse told Mr. Schroeder that he assisted Mr. Burke in discarding the incident knife. He also told her that the rock used to harm Jay was flipped over and nearby. He also said that there was a BB or pellet was shot into Jay. CP 26 ¶ 15. During a vigil for Jay in May 2016, Ms. Schroeder found the rock. It had been turned over to hide a blood stain and was positioned near the location where blood sprayed the side of the complex. CP 26 ¶ 16.

F. Centralia Police Department and the Rock, Necropsy, and Photographs.

CPD Officer William D. Phipps responded to the 911 call on April 28, 2016. Report number 16A5221 was assigned. In the course of his investigation that evening, Officer Phipps took photographs of the blood splatter on the siding of the complex and of Jay after being taken out of a garbage bag that had been placed in the dumpster, as another officer had instructed. CP 30. He also logged numerous photographs taken by Alicia Schroeder, including those from the night of April 28, 2016 with Jay's deceased body found under the cyclone fence. On May 5, 2016, Ms. Schroeder gave Officer Phipps the incident rock, which he weighed at 3.14-3.15 lb. CP 33-34, 37-47.

On April 29, 2016, retired Thurston County Sheriff's Deputy Barnes M. Ware and his wife Mary Ware arrived at Ms. Schroeder's residence, took Jay's boxed and bagged body from the trash and had Ms. Schroeder sign and initial the box. The Wares then respectfully placed his body in a spare refrigerator inside their locked garage. The next morning, at about 9:30 a.m. on April 30, 2016, Mr. Ware met with Thurston County Animal Services Officer Erika Johnson at the Steamboat Animal Hospital. Mr. Ware signed the box when he released it to Officer Johnson, who took Jay into the hospital. As discussed below, Dr. Victoria Smith necropsied Jay. CP 32.

G. <u>Erika Johnson.</u>

A former police officer and deputy sheriff, and thereafter a commissioned animal control officer for the last decade, Officer Johnson has investigated over 4000 cruelty/neglect cases in Oregon and Washington. She learned of Jay's tragedy through local media coverage. CP 49 ¶ 1. She also prepared a *Field*

Investigation Report documenting chain of custody of Jay's body. CP 53-55. On Jun. 28, 2016, she met with Lewis County Deputy Prosecuting Attorney Bradley Meagher and Centralia Police Chief Carl Nielsen at CPD. Pasado's Safe Haven humane investigator Kim Koon, and private citizen Cyndy Hahn, accompanied her. CP 49 ¶ 2. Meagher refused to prosecute Burke, claiming that he "was putting the cat out of its misery." CP 49 ¶ 3. Meagher also refused to charge Ms. Miller, exclaiming, "You want me to charge the mother?!" Despite her explaining that the Thurston County Prosecuting Attorney's Office successfully prosecuted a mother for the actions of her children, Meagher dismissed Johnson's position, saying, "I take offense to this." He also refused to charge anyone with felony animal cruelty under the amended prong RCW 16.52.205(1)(c) related to killing an animal "while manifesting an extreme indifference to life[.]" CP 49-50 ¶ 4. Claiming difficulty accepting the results of the necropsy in that he did not know "which of the multiple lethal injuries stopped Jay's beating heart," he nonetheless gave no consideration to RCW 16.52.205(1)(a) or (1)(b) concerning infliction of substantial pain or causing physical injury. Nor did he consider second-degree cruelty charges. CP 50 ¶ 5. Meagher was extremely arrogant and condescending during this meeting. CP 50 ¶ 6.

H. <u>Victoria Logan Smith, DVM.</u>

Dr. Smith obtained her Doctor of Veterinary Medicine in 2004 from Texas A&M University College of Veterinary Medicine, where she graduated *summa cum laude*. She is currently pursuing her diplomate from the American Board of Veterinary Practitioners. CP 57 ¶ 2. Dr. Smith works as a Small Animal Medicine

and Surgery Associate at Steamboat Animal Hospital in Olympia and is also the Chief of the Surgical and Medical Team for the Veterinary Field Unit with the 149th MDVS at Joint Base Lewis-McChord. Dr. Smith has consulted with various law enforcement agencies and prosecuting attorney's offices on animal cruelty matters for large and small victims and has also taken CME courses in animal forensics. She estimates having examined 100 animal cruelty/neglect cases since 2008 and completed over 50 necropsies. CP 57 ¶¶ 3-4.

On April 30, 2016, at about 9:45 a.m., fewer than two days after his death, Dr. Smith performed a gross necropsy of Jay, with radiography, as more fully described in her declaration. CP 57-59 ¶¶ 5-20. Dr. Smith also reviewed the Gonzalez, Velazquez, Schroeder, and Bowens' declarations. In her expert opinion, she opines that Jay sustained severe head and neck trauma, suffering extensively in his final moments, with painful crushing, blunt, and sharp force trauma, and possibly asphyxiating trauma. CP 60 ¶¶ 22-23. He endured numerous, grievous physical injuries prior to his death, resulting from being squeezed and possibly strangled; having a large blunt object (like a rock) dropped or smashed on his head and/or neck region; and having a sharp object (like a knife) thrust into his skull. CP 60 ¶ 24. In her opinion, Jay was alive after Mr. Burke stabbed him. CP 60 ¶ 25. Jay was not "euthanized" as defined by RCW 16.52.011(1)(e). CP 60 ¶ 26. Jay died by a means causing undue and unconscionable suffering and pain in all (and each) of the manners described above, and resulted from those manifesting an extreme indifference to his life. CP 60 ¶¶ 27-29.

I. <u>Kyle Bobby Burke and Richard Joshua Allshouse.</u>

Kyle Bobby Burke was convicted of second-degree animal cruelty (RCW 16.52.207(2)(a)) on March 20, 2015, arising from subjecting two Chihuahuas to torturous and excessive temperatures by confining them in a vehicle. His actions involving Jay arguably violated his 2-year probation. *See State v. Burke*, Thurston Cy. Dist. Ct. No. 14-M00433 TCP, attached J&S and Application and Affidavit for Search Warrant, prepared by Officer Johnson. CP 72, 76-82. Richard Joshua Allshouse appears from JIS to have been convicted of Disorderly Conduct and Malicious Mischief in the Third Degree in *City of Centralia v. Allshouse*, Centralia Muni. Ct. No. 4Z0086297 (guilty finding Apr. 21, 2015); and appears to have been convicted of No Contact/Protection Order Violation in *City of Centralia v. Allshouse,* Centralia Muni. Ct. No. 4Z1075224 (pleaded guilty Apr. 21, 2015). He also pleaded guilty on Jan. 30, 2013 to Theft 3rd Degree in *City of Centralia v. Allshouse*, Centralia Muni. Ct. No. 2Z0719655. A warrant was issued for Mr. Allshouse for failure to appear at a hearing on his charges for 4th Degree Assault and Interference with Reporting Domestic Violence in *City of Centralia v. Allshouse*, Centralia Muni. Ct. No. 6Z0749750 (warrant issued Aug. 9, 2016).

J. <u>Prosecutorial Inertia.</u>

Two other deputy prosecuting attorneys – Kevin Nelson and Jonathan Meyer – refused to charge Ms. Miller, Mr. Burke, and Mr. Allshouse with any crime, parroting the reasoning of Mr. Meagher. *See Apr. 29, 2016 Nelson Letter to Chief Nielsen* and *Dec. 6, 2016 Meyer Letter* responding to *ALDF Criminal Justice Fellow David Rosengard's Nov. 22, 2016 Letter*. CP 62-71. Meagher, Nelson, and Meyer myopically focused on one prong of one statute, disregarding

that abundant evidence supported probable cause to charge Miller, Burke, and Allshouse with several crimes. Indeed, Judge Toynbee found that probable cause did exist to charge each of them with Second-Degree Animal Cruelty, Taking/Concealing/Injuring or Killing a Pet, and Malicious Mischief in the Third Degree, whether as principals, accomplices, or conspirators. CP 329.

K. Criminal Charges to be Brought.

a. Felony Animal Cruelty (RCW 16.52.205(1)) Against Burke.

RCW 16.52.205(1) states:

> (1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering or while manifesting an extreme indifference to life, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

Putting aside what prosecutor Bradley Meagher described as "the biggest problem with the case," viz., "which injury caused [Jay's] death," unrefuted lay and expert testimony confirmed that without lawful authority, Mr. Burke intentionally inflicted substantial pain on Jay, satisfying RCW 16.52.205(1)(a) beyond a reasonable doubt. He also, without authorization in law, intentionally caused physical injury to Jay, meeting the elements of RCW 16.52.205(1)(b).

The term "undue suffering" and the phrase "while manifesting an extreme indifference to life" do not modify either subsection (a) or (b), but even if they did apply, the facts undoubtedly support them. *See State v. Andree*, 90 Wash.App. 917, 920 (I, 1998) ("In reaching this conclusion, we hold that the term 'undue suffering' does not modify the terms 'substantial pain' or 'physical injury'.") RCW 16.52.205(1)'s 2015 amendment to include "while manifesting an extreme

indifference to life" grammatically follows *Andree*'s holding and nothing in the amendment suggests a legislative repeal thereof. *Andree* upheld the conviction of a man who killed a kitten by stabbing the animal nine times with a hunting knife, finding that his conduct, "at the very least, violates the statute's first two alternatives, causing physical injury and substantial pain to an animal." *Id.*, at 920. *Andree,* and common sense, compelled more action than taken by the prosecuting attorney's office.

Mr. Meagher contended that Mr. Allshouse and Mr. Burke "went outside to help the cat, but it was already dead." However, he disregarded evidence from no fewer than three witnesses that Jay was very much alive after being stabbed – Alicia Schroeder, Elijah Bowen, and Selena Velazquez. He also did not resist the evidence that not one authority on euthanasia endorses death by stabbing, even as to livestock, who must first be rendered insensible to pain. And he did not consider that the demeanors of Mr. Burke and Mr. Allshouse were entirely inconsistent with any benevolent motivation to provide Jay with a good death. Horseplaying in competitive fervor to be the first to stab "it," telling inquiring children not to worry about what they were about to witness, and then hiding the knife after the deed was done, tell a much different story. Further, Mr. Meagher failed to answer the most evident question of why Mr. Burke would see the need to stab Jay with a knife <u>if he were already deceased</u>. Moreover, the source of the alleged claim that Jay was dead before being stabbed came from a man convicted of third-degree theft in 2013. *See City of Centralia v. Allshouse,* Centralia Muni. Ct. No. 2Z0719655.

No legal excuse supports Mr. Burke's self-serving and fraudulent contention that he plunged a knife into Jay's skull in order to euthanize him. Assuming *arguendo* this was his intention, he clearly did not abide the definition of euthanasia at RCW 16.52.011(e). Nor does any recognized and legitimate authority promote euthanasia by stabbing.[1] Even the federal and State humane methods of slaughter acts do not promote sticking as a humane or legal means of ending life of statutorily covered animals, *unless* the animal is first rendered insensible to pain. See RCW 16.50.110(3), defining "Humane method" as either:

> (a) A method whereby the animal is rendered insensible to pain by mechanical, electrical, chemical, or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or (b) a method in accordance with the ritual requirements of any religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

The law and facts clearly align to support a charge of felony animal cruelty against Mr. Burke under either or both RCW 16.52.205(1)(a) and RCW 16.52.205(1)(b).

b. <u>Misdemeanor Animal Cruelty (RCW 16.52.207(1)).</u>

> *Animal cruelty in the second degree—Penalty.*
>
> (1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

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[1] See HSUS Euthanasia Reference Manual (https://www.animalsheltering.org/sites/default/files/content/euthanasia-reference-manual.pdf); World Society for the Protection of Animals Methods for the euthanasia of dogs and cats: comparison and recommendations (http://www.icam-coalition.org/downloads/Methods%20for%20the%20euthanasia%20of%20dogs%20and%20cats-%20English.pdf); and AVMA Guidelines for the Euthanasia of Animals (https://www.avma.org/KB/Policies/Documents/euthanasia.pdf).

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:
(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure;
(b) Under circumstances not amounting to animal cruelty in the second degree under (c) of this subsection, abandons the animal; or
(c) Abandons the animal and (i) as a result of being abandoned, the animal suffers bodily harm; or (ii) abandoning the animal creates an imminent and substantial risk that the animal will suffer substantial bodily harm.
(3) Animal cruelty in the second degree is a gross misdemeanor.
(4) In any prosecution of animal cruelty in the second degree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.
[**2011 c 172 § 5; 2007 c 376 § 1; 2005 c 481 § 2; 1994 c 261 § 9.**]

Eyewitness testimony of the three young girls, of Eli Bowen, and Alicia Schroeder, as well as expert testimony of Dr. Smith, amply support a finding that Tina Miller and Kyle Burke each inflicted, with at least criminal negligence, unnecessary suffering or pain upon Jay.

c. Misdemeanor Injure/Kill Pet Animal (RCW 9.08.070(1)(c)).

Pet animals—Taking, concealing, injuring, killing, etc.—Penalty.
(1) Any person who, with intent to deprive or defraud the owner thereof, does any of the following shall be guilty of a gross misdemeanor punishable according to chapter **9A.20** RCW and, for adult offenders, a mandatory fine of not less than five hundred dollars per pet animal shall be imposed, except as provided by subsection (2) of this section:
(a) Takes, leads away, confines, secretes or converts any pet animal, except in cases in which the value of the pet animal exceeds seven hundred fifty dollars;
(b) Conceals the identity of any pet animal or its owner by obscuring, altering, or removing from the pet animal any collar, tag, license, tattoo, or other identifying device or mark;

(c) Willfully or recklessly kills or injures any pet animal, unless excused by law.
(2) Nothing in this section shall prohibit a person from also being convicted of separate offenses under RCW 9A.56.030, 9A.56.040, or9A.56.050 for theft, under RCW 9A.56.150, 9A.56.160, or 9A.56.170 for possession of stolen property, or under chapter 16.52 RCW for animal cruelty.
[2015 c 265 § 10; 2015 c 235 § 5; 2003 c 53 § 9; 1989 c 359 § 2; 1982 c 114 § 1.]

E.M. and Tina Miller each knew that they did not own Jay or have a right to possess him, yet they conspired to intentionally deprive the Schroeder family of Jay by taking and converting him, violating RCW 9.08.070(1). Mr. Burke willfully or recklessly killed or injured Jay by stabbing him in the head, violating RCW 9.08.070(1)(c).

d. Misdemeanor Malicious Mischief (RCW 9A.48.090).

Malicious mischief in the third degree.

(1) A person is guilty of malicious mischief in the third degree if he or she:
(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree; or
(b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.
(2) Malicious mischief in the third degree is a gross misdemeanor.
[2009 c 431 § 6; 2003 c 53 § 71; 1996 c 35 § 1; 1975 1st ex.s. c 260 § 9A.48.090.]

E.M. and Mr. Burke knowingly and maliciously caused physical damage to Jay, whom neither owned, violating RCW 9A.48.090(1)(a).

e. Criminal conspiracy (RCW 9A.28.040).

Criminal conspiracy.

(1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

(2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:

(a) Has not been prosecuted or convicted; or

(b) Has been convicted of a different offense; or

(c) Is not amenable to justice; or

(d) Has been acquitted; or

(e) Lacked the capacity to commit an offense; or

(f) Is a law enforcement officer or other government agent who did not intend that a crime be committed.

(3) Criminal conspiracy is a:

(a) Class A felony when an object of the conspiratorial agreement is murder in the first degree;

(b) Class B felony when an object of the conspiratorial agreement is a class A felony other than murder in the first degree;

(c) Class C felony when an object of the conspiratorial agreement is a class B felony;

(d) Gross misdemeanor when an object of the conspiratorial agreement is a class C felony;

(e) Misdemeanor when an object of the conspiratorial agreement is a gross misdemeanor or misdemeanor.

[**1997 c 17 § 1; 1975 1st ex.s. c 260 § 9A.28.040.**]

E.M. and her mother joined efforts to take and convert Jay. Indeed, Ms. Miller conspired with her daughter to allegedly violate the traffic code by letting her operate a motor vehicle, causing property damage, and then concealing the illicit activity. Further, Ms. Miller has recklessly permitted her violent daughter to possess firearms. Ms. Miller had to also have known that she could not have pulled Jay through the four-inch gap between each shaft of the railing, yet she reached her hand through in order to grasp Jay from a height of at least nine feet above the ground, aiding her daughter in unlawfully keeping Jay from his rightful

owners and those assisting in his lawful return. Ms. Miller also dropped Jay twice, aware that he suffered injury after falling the first time. Her decision to repeat the maneuver eliminates any doubt as to her intent to commit numerous crimes described herein.

Mr. Burke and Mr. Allsworth were reportedly heady at the prospect of being the first to stab "it," laughing and shoving each other in a giddy storm down the stairs. After thrusting the knife into Jay's skull, Mr. Burke handed the bloodied weapon to Mr. Allsworth, who then ran off and concealed the weapon so it could not be found. In so doing, Mr. Allsworth entered into a criminal conspiracy to violate the crimes described herein.

f. <u>Criminal Complicity (RCW 9A.08.020(1)).</u>

> *Liability for conduct of another—Complicity.*
> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or
> (b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or
> (c) He or she is an accomplice of such other person in the commission of the crime.
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it; or
> (b) His or her conduct is expressly declared by law to establish his or her complicity.

> (4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.
> (5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:
> (a) He or she is a victim of that crime; or
> (b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.
> (6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.
> [**2011 c 336 § 351;** 1975-'76 2nd ex.s. c 38 § 1; **1975 1st ex.s. c 260 § 9A.08.020.**]

As discussed above, mother and daughter, and male friends, each conspired to commit various crimes against Jay and the Schroeder family. Alternatively, the mother was an accomplice to her daughter, and Mr. Allsworth an accomplice to Mr. Burke under RCW 9A.08.020(1), (2)(c), (3)(a)(i), (3)(a)(ii). Furthermore, Mr. Allsworth is an accomplice after the fact by hiding the incident weapon.

g. Considerations for Filing Citizen Complaint.

To file a criminal citizen complaint, the court must consider probable cause and may consider elements (1) through (7) under CrRLJ 2.1(c). Those issues are addressed *seriatim*:

(1) Whether an unsuccessful prosecution will subject the State to costs or damage claims under RCW 9A.16.110, or other civil proceedings.

Civil liability will only attach if the prosecution commences in bad faith and without probable cause. The evidence plainly supports the proposed counts.

RCW 9A.16.110 (Defending against violent crime – Reimbursement) does not apply here. Any civil suit would likely be dismissed as frivolous. A finding of probable cause negates a claim for malicious prosecution as a matter of law. *Jacques v. Sharp,* 83 Wash.App. 532 (1996); *Hanson v. City of Snohomish,* 121 Wn.2d 552 (1993); *Peasley v. Puget Sound Tug & Barge Co.,* 13 Wn.2d 485 (1942). Judge Toynbee agreed that this factor favored Ms. Johnson. CP 329.

(2) Whether the complainant has adequate recourse under laws governing small claims suits, anti-harassment petitions or other civil actions.

Given the state of animal law presently, which does not permit standing for nonhuman animals by a next friend or guardian, there is no legal alternative to criminal prosecution. Ms. Johnson and numerous other concerned citizens have already attempted to seek recourse through the prosecuting attorney's office, had been extremely remiss in its duty to properly evaluate this matter under any or all of the laws described herein, except to refer potential charges against E.M. to the Juvenile Division for a diversion. Judge Toynbee agreed that this factor favored Ms. Johnson, noting that she may not have recourse given she did not own Jay. CP 329.

(3) Whether a criminal investigation is pending.

The investigation has long ended. Judge Toynbee agreed. CP 329.

(4) Whether other criminal charges could be disrupted by allowing the citizen complaint to be filed.

No criminal charges pertaining to Baby Jay are pending against Kyle Burke, Tina Miller, or Richard Allshouse. Judge Toynbee agreed that it did not

appear other charges would be disrupted by allowing the citizen criminal complaint. CP 329.

(5) The availability of witnesses at trial.

All witnesses executed declarations and can be subpoenaed for trial. Judge Toynbee found no reason to believe that witnesses would be unavailable. CP 329.

(6) The criminal record of the complainant, potential defendant and potential witnesses, and whether any have been convicted of crimes of dishonesty as defined by ER 609.

Complainant Erika Johnson is a former law enforcement officer and senior animal control officer for Joint Animal Services. As to Mr. Burke and Mr. Allshouse, see, supra, Section IV(I). According to JIS, Alicia Marie Schroeder pleaded guilty to Theft 3rd Degree on Jul. 21, 2010 in *City of Chehalis v. Schroeder*, Chehalis Muni. Ct. No. 22417. Without a date of birth, it was not readily possible to determine Tina M. Miller's criminal record. On information and belief, minors Bowen, Ms. Gonzalez, and Ms. Velazquez have no criminal records.

(7) Prosecution standards under RCW 9.94A.440 (now RCW 9.94A.411).

Prosecution is both technically sufficient and serves an important public purpose. RCW 9.94A.411 articulates reasons to decline to prosecute, which are negated in turn:

(a) **Contrary to Legislative Intent:** it is not contrary to legislative intent (animal cruelty laws were intended precisely to punish what occurred to Jay);

(b) **Antiquated Statute:** The State and local laws at issue are not antiquated;

(c) **De Minimis Violation:** the violation is not *de minimis*;

(d) **Confinement on Other Charges:** the purported defendants are not, on information and belief, confined on other charges;

(e) **Pending Conviction on Another Charge:** there is no known pending conviction for another charge, except a diversion for E.M.;

(f) **High Disproportionate Cost of Prosecution:** the cost of not prosecuting this heinous crime, committed in front of and involving children, is highly disproportionate to the efforts undertaken to obtain and preserve evidence and present prosecution witnesses;

(g) **Improper Motives of Complainant:** the only motivation of the complainant is to punish needless animal suffering;

(h) **Immunity:** no immunity issues arise here;

(i) **Victim Request:** the victim (viz., Jay), if he had a human spokesperson or guardian ad litem, would assuredly want to avoid cruel treatment and torture, like all sentient beings; this motivation is necessarily implied from our cruelty laws, which permit prosecution of those who legally "own" the animal victim, as well as defend those animals who have no owners at all.

RCW 9.94A.411 also speaks to standards favoring prosecution. For property crimes, they will be filed "if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised." The expert and lay evidence provided herein amply convinces under this standard.

V. ARGUMENT [WARE]

A. History of RCW 10.27.030.

> *Summoning grand jury.*
>
> No grand jury shall be summoned to attend at the superior court of any county except upon an order signed by a majority of the judges thereof. A grand jury **shall** be summoned by the court, *where the public interest so demands*, whenever in its opinion *there is sufficient evidence of criminal activity* or corruption within the county **or** whenever so requested by a public attorney, corporation counsel or city attorney upon showing of good cause.

A plain reading reveals a disjunctive directive: the superior court must empanel a grand jury where *either* (1) the public interest so demands and there is sufficient evidence of criminal activity or corruption[2] within the county, or (2) when requested by the city or county attorney upon showing of good cause. While the LCPAO is free not to petition the superior court, the public may do so explicitly. On behalf of those similarly situated, which count in the *thousands*, retired veteran lieutenant Barnes Michael Ware, formerly with Thurston County Sheriff's Office, having extensive experience in investigating animal cruelty cases, and who had direct involvement in the investigation of Jay's slaying, represents the public interest. Consider also the 1191 members (as of September 20, 2017) of the *Justice for Jay, Lewis Co., WA* Facebook page

[2] While not going so far as to allege corruption, the willful refusal of the entire LCPAO to acknowledge the current, undisputed state of Washington criminal law pertaining to animals, and a sitting district court judge's refusal to grant Ms. Johnson's petition in such an obvious case of animal cruelty and torture, creates an index of suspicion warranting this higher court's compassionate and thoughtful examination under RCW 10.27.030.

(www.facebook.com/groups/Justice4Jay), and the extensive media coverage in both print and television.[3]

Perhaps the public oversight discomfits the LCPAO in calling attention to analytical deficiencies and mindboggling refusals to speak directly to the arguments made and facts adduced. Regardless, at the hearing, dozens of supporters from within the County, and as far as Seattle and Portland, attended, respectfully, without disruption or untoward behavior. One advocate joining the public ranks mourning the tragic loss of Jay was the inoffensive and gentle six-year-old boy depicted here – hardly the poster child of an "angry animal rights mob":

[3] *Justice for Jay? Attorney fights for Centralia cat that was beaten, stabbed before death* (Q13 Fox, Dec. 28, 2016); Natalie Johnson, *Jay the Cat: Prosecutor Issues 'Spirited' Response to Grand Jury Request from 'Angry Animal Rights Mob'*, The Chronicle (Dec. 30, 2016); Sharyn Decker, *Animal lawyer, animal control officer pushing for charges in Centralia cat's death*, Lewiscountysirens.com (Dec. 27, 2016); Rolf Boone, *Attorney demands justice for cat that was 'beaten, stabbed, hit with a rock and dropped from a balcony' before it died*, The Olympia (Dec. 28, 2016); Natalie Johnson, *Activists Vow to Continue Fight for Criminal Charges in Centralia Cat's Death*, Lewis County Watch (Dec. 28, 2016). The December 27, 2016 hearing also aired on KIRO.

Left with nothing more, the LCPAO resorted to hyperbolic and easily disproved *ad hominem* attacks ("disgruntled animal rights activists," "angry animal rights mobs," calling the petition an "abuse of process"), giving life to the admonition of Roman philosopher Marcus Tullius Cicero, who warned over two millennia ago, "When you have no basis for an argument, abuse the plaintiff."

In 1971, the legislature repealed RCW 10.28.160 (titled "True bills at instance of private prosecutor"), but not *just* that provision. 1971 ex.s. c 67 § 20 repealed *the entire chapter*, Ch. 10.28 RCW. It then rebuilt the grand jury procedures under Ch. 10.27 RCW, creating new sections, merging old ones, and updating others. One of those provisions was RCW 10.27.030, which provides for empanelment by majority vote of the sitting judges, whether brought to their attention by a public attorney *or* otherwise. Practically speaking, the judges would not be expected to empanel a grand jury *sua sponte* by reading the morning paper but, rather, on demand of private citizens giving voice to the "public interest." To avoid rendering superfluous the phrase "*where the public interest so demands, whenever in its opinion there is sufficient evidence of criminal activity or corruption within the county*," the statute must be interpreted to allow a citizen to formally seek an audience with the court on a matter of public concern when the public prosecutor fails to act. Indeed, the historical practice of *allowing* grand juries to consider bills brought by a private prosecutor *favors* a reading retaining such an avenue for public access.

At common law, grand juries were tasked with inquiring into potentially actionable criminal acts made known to its members. *Brack v. Wells*, 184 Md. 86

(1944), described the access a private citizen possessed to bend the ear of the grand jury:

> That other adequate remedy to which the petitioner is entitled is that of personally presenting his case to the grand jury of Baltimore City. Whether the petitioner should without formality present himself at the door of the grand jury room and ask to state his case or whether he should communicate with the foreman of the grand jury and ask for an opportunity to appear before that body is not for this Court to say. **The members of the grand jury in their oath prescribed by the common law, in addition to other things, swore that they would diligently inquire and true presentment make of all such matters and things as shall be given them in charge *or shall otherwise come to their knowledge***. **The inquisitorial powers of the grand jury are not limited to cases in which there has been a preliminary proceeding before a magistrate nor to cases laid before them by the Court or State's Attorney**. Whatever may be the duties and powers of that important body in other jurisdictions, in Maryland those inquisitorial powers are broad, full and of a plenary character. Our predecessors, speaking through Judge McSherry in the case of Blaney v. State, 74 Md. 153, 156, 21 A. 547, 548, said: 'However restricted the functions of grand juries may be elsewhere, we hold ***322** that in this state they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the court nor the state's ***92** attorney has laid the matter before them. The peace, the government, and the dignity of the state, the well-being of society, and the security of the individual demand that this ancient and important attribute of a grand jury should not be narrowed or interfered with when legitimately exerted.' In that same case and at the same reference is contained a very pertinent quotation as to the duties of the grand jury in language which cannot be improved upon here: 'To them is committed the preservation of the peace of the county; the care of bringing to light for examination, trial, and punishment, all violence, outrage, indecency, and terror; everything that may occasion danger, disturbance, or dismay to the citizen. **They are watchmen, stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated or the laws infringed**." These broad inquisitorial powers of the grand jury in this State have been further affirmed in many other cases among which are: In re Report of Grand Jury, 152 Md. 616, 621, 137 A. 370; Coblentz v.

> State, 164 Md. 558, 566, 166 A. 45, 88 A.L.R. 886; Hitzelberger v. State, 173 Md. 435, 440, 196 A. 288. Under these broad inquisitorial powers the grand jury may, of course, investigate a case which the State's Attorney, in his discretion, has decided not to present to that body. Upon the proper functioning of the grand jury the lives, security, and property of the people largely depend.

Id., at 91-92 (emphasis added). The Maryland Court of Appeals cited to decisions from Rhode Island and Illinois in exploring the means of private prosecutors preferring indictments:

> The grand jury at common law has the power to prefer indictments at the instance of private prosecutors. Thompson & Merriam, Juries, § 609 (1882); Regina v. Russell, Car. & M. 247; In re Opinion to Governor, 1939, 62 R.I. 200, 4 A.2d 487, 121 A.L.R. 806; People v. Sheridan, 1932, 349 Ill. 202, 208, 181 N.E. 617, 619; People ex rel. v. Graydon, 1929, 333 Ill. 429, 433, 164 N.E. 832, 839; Blaney v. State, 74 Md. 153, 21 A. 547. I

Id., at 93. RCW 10.27.100 codifies this common law understanding by providing:

> *Inquiry as to offenses—Duties—Investigation.*
>
> The grand jurors shall inquire into every offense triable within the county for which any person has been held to answer, if an indictment has not been found or an information filed in such case, and **all other indictable offenses within the county which are presented to them by a public attorney or otherwise come to their knowledge**. **If a grand juror knows or has reason to believe that an indictable offense, triable within the county, has been committed, he or she shall declare such a fact to his or her fellow jurors who may begin an investigation**. In such investigation the grand juror may be sworn as a witness.

Treating public attorneys, as LCPAO argues, as the only individuals authorized to present complaints to a grand jury would ignore the "*or otherwise come into their knowledge*" language. The superior court may come into knowledge of public concern by many avenues, including verbal communication or even the informality of an email. Certainly, if any citizen may approach a grand

juror and simply share fears that criminal misconduct is afoot on the streets of Centralia, a formal petition filed with the superior court passes muster.

Historical support exists to broadly grant authority to grand juries to investigate "crime or corruption" based on mere "suspicion or rumor," as the grand jury's duty is to serve as the citizen's voice in enforcing the criminal laws. Utter & Spitzer, *The Washington State Constitution: A Reference Guide*, 40-41 (2002); *U.S. v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991)("grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not")(internal quotation marks omitted); LaFave, et al., 3 *Criminal Procedure* §§ 8.1(a), 8.2(c) (3d ed. WL)(grand jury broad investigative authority dates at least back to 1612 in England). In this spirit, RCW 10.27.030 provides a degree of democratic control over the investigation of criminal behavior and official wrongdoing within Lewis County.

Additionally, RCW 10.27.150 does not require a public prosecutor's stamp of approval to issue an indictment. Rather, eight of twelve jurors may so act:

> *RCW 10.27.150*
>
> *Indictments—Issuance.*
>
> After hearing, examining, and investigating the evidence before it, a grand jury may, in its discretion, issue an indictment against a principal. A grand jury shall find an indictment only when from all the evidence at least **three-fourths of the jurors are convinced that there is probable cause to believe a principal is guilty of a criminal offense**. When an indictment is found by a grand jury the foreperson or acting foreperson shall present it to the court.

If the legislature intended to restrict grand jury empanelments in the limited manner urged by the LCPAO, it would not have included the language examined above in RCW 10.27.030, .100, and .150.

B. The Question of Constitutionality.

The Lewis County Superior Court concluded that to allow Mr. Ware to petition for a grand jury would "usurp [the prosecuting attorney's] executive power," adding that "the fundamental principal of separation of powers" underlies its decision. *Carrick v. Locke,* 125 Wn.2d 129 (1994), holding that the coroner's inquest statute and county executive order implementing same did not violate separation of powers doctrine, proves judicious, for it described the grand jury function as "fall[ing] in the gray zone at the periphery of both the executive and judicial branches." *Id.,* at 139. Unlike inquests, grand juries are expressly authorized by the constitution. Wash.Const.Art.II, §26 ("No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.")

The court described the role of the grand jury as "an institution [that] has one foot in the judicial branch and the other in the executive." *Id.,* at fn. 3 (quoting *In re Request for Access to Grand Jury Materials,* 833 F.2d 1438, 1444 (11th Cir.1987)). In finding that "[t]he unique function of the grand jury necessitates a high degree of cooperation between the judicial and executive branches," the court concluded that "[t]he constitutionality of this arrangement under both the federal constitution and Washington's constitution is unquestionable." *Id.* Indeed, the judicially led investigation by Chief Justice Earl

Warren of the United States Supreme Court into the assassination of President Kennedy bespeaks this point. *Id.,* at fn. 4.

> *Carrick* explored the separation of powers doctrine further:
>
> > The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Id., at 135 (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750 (1975)).

> > In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch's tolerance of analogous practice.

Id., at 136 (citing *Minstretta v. U.S.,* 448 U.S. 361, 398-401 (1989)). "Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952)(Frankfurter, J., concurring)). *Carrick* expressly rejected a rigid categorical view of governmental functions for purposes of separation of powers analysis. *Id.*, at 137 (citing *Morrison v. Olson,* 487 U.S. 654, 689-91 (1988)). In evaluating the investigation of crimes, *Carrick* recognized the high degree of collaboration between the judicial and executive branches and rejected respondents' position to abandon Washington's tradition of bilateral investigation. *Id.,* at 137. As the Washington Supreme Court stated nearly two decades before *Carrick,* "the separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." *In re Juvenile Director,* 87 Wn.2d 232, 240 (1976).

Given the foregoing, the existence and function of a grand jury cannot possibly raise any legitimate separation of powers concern. The Lewis County Superior Court and LCPAO appear troubled, rather, by the *manner* in which the court comes into knowledge of alleged criminal offenses and chooses whether to empanel a grand jury. Neither the Court nor LCPAO articulated why it matters constitutionally whether a majority of superior court judges votes to assemble one at the instance of the public prosecutor or a private citizen.

Wash. Const. Article I, § 25 states that prosecutions must occur by information or indictment "as shall be prescribed by law." Washington "law" allows for criminal prosecutions by way of information (whether lodged by the public prosecutor or a private prosecutor via CrRLJ 2.1(c)) or by indictment (empaneled exclusively by the superior court whether at the request of the public prosecutor or, as here, a petitioner bringing attention to the public interest in enforcement of the criminal laws, pursuant to RCW 10.27.030 and Wash.Const. Art. I, § 26). Mr. Ware invoked direct legislative pronouncement (RCW 10.27.030) to summon a 12-person jury from Lewis County who shall determine, using all the tools at its disposal, whether probable cause exists to indict Mr. Burke for felony animal cruelty. If so, then the LCPAO may rest assured that it has vetted a triable case before reasonable factfinders.

The Lewis County Superior Court bench's April 21, 2017 decision cited abundantly from *State v. Rice*, 174 Wn.2d 884 (2012) for the proposition that the prosecuting attorney enjoys broad, unique, and exclusive discretion. Jennifer Rice was convicted of first-degree kidnaping a ten year old boy, predatory first-degree

child molestation, and two counts of third-degree child rape. Owing to special allegations under RCW 9.94A.835 and .837 for sexual motivation and for having a victim under age 15, her sentence was increased. Rice contended that the mandatory language of RCW 9.94A.835, which required the prosecutor to make such special allegations, violated the doctrine of separation of powers and rendered it unconstitutional. The Court of Appeals disagreed, finding that the prosecutor's charging discretion remained uninvaded for he or she still had to ascertain evidentiary sufficiency of the special allegations before making them. The Washington Supreme Court affirmed, noting that the challenged statutes were "directory rather than mandatory," in that they "do not attach any legal consequences to a prosecutor's noncompliance, and the legislature elsewhere in the same chapter has acknowledged that prosecuting attorneys retain broad charging discretion notwithstanding statutory language directing them to file particular charges." *Rice*, at 889.

Rice had nothing to do with private petitions such as those lodged by Mr. Ware and Ms. Johnson under RCW 10.27.030 or CrRLJ 2.1(c). Besides, it is readily reconciled with that statute and rule, for one may acknowledge that the public prosecutor retains broad charging discretion to make special allegations or file a criminal charge without diminishing or nullifying the statutory and rule-based grants to private citizens to exercise their own discretion, even if it flatly contradicts the desires of the public prosecutor. CrRLJ 2.1(c)'s prescribed format for the AFFIDAVIT OF COMPLAINING WITNESS contemplates that criminal proceedings may commence from two sources (one public, one private),

concurrent and non-mutually exclusive. The form states, in part, "I, the undersigned complainant, understand that I have the choice of complaining to a prosecuting authority rather than signing this affidavit. I elect to use this method to start criminal proceedings." It also states, "I (have)(have not) consulted with a prosecuting authority concerning this incident." Such language endorses the distinction between the public and private prosecutor, leaving one free to decline without prejudice to the other's right to proceed. RCW 10.27.030 similarly articulates a separate starting point. No legitimate authority exists to deny Mr. Ware or Ms. Johnson the right to petition the court.

C. On the Merits.

The Court never reached the merits, but the LCPAO conspicuously refused to discuss the other prongs of RCW 16.52.205(1), viz., (a) and (b). RCW 16.52.205(1) states:

> (1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering or while manifesting an extreme indifference to life, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

Without lawful authority, Mr. Burke intentionally inflicted substantial pain on Jay, satisfying RCW 16.52.205(1)(a) beyond a reasonable doubt. He also, without authorization in law, intentionally caused physical injury to Jay, meeting the elements of RCW 16.52.205(1)(b). The term "undue suffering" and the phrase "while manifesting an extreme indifference to life" do not modify either subsection (a) or (b), but even if they did apply, the facts support them. *See State v. Andree,* 90 Wash.App. 917, 920 (I, 1998).

VI. ARGUMENT [JOHNSON]

A. Constitutionality of CrRLJ 2.1(c).

A brief detour into the history of CrRLJ 2.1(c), the rule providing for private prosecution of misdemeanors, is warranted. The Washington Supreme Court clearly sees nothing unfitting by such procedure, having retained CrRLJ 2.1(c) without modification. Indeed, accusations of unconstitutionality were rejected by the Supreme Court in 1995, having made no changes despite WAPA and DMCJA's protestations. CP 368-383.

The citizen criminal complaint rule has been Washington law (in various forms) from the early days of its statehood and even before, when it was made a territory in 1853. In 1854, thirty-five years before the Washington Constitution was approved, territorial law permitted any person to approach a superior court judge or any justice of the peace asking that a warrant be issued for misdemeanors and felonies. Ballinger Code § 6695 (1897); Remington Revised Code § 1949 (1932); Pierce Code § 3114 (1905). Indeed, early cases before the Supreme Court discuss when private citizens appeared to prefer a criminal charge against a third party. See *State ex rel. Murphy v. Taylor*, 101 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906).

JCrR 2.01 allowed citizen criminal complaints for felonies and misdemeanors. JCrR 2.01(d)(1963); JCrR 2.01(c) (1969). The JCrRs were replaced with the CrRLJs, providing the most current version of CrRLJ 2.1(c)(last amended in 1999). The Supreme Court's power to enact JCrR 2.01 and CrRLJ 2.1(c) derives from both the constitution and statute, vesting in it "coextensive

authority" to make rules with the legislature. *Sackett v. Santilli*, 146 Wn.2d 498, 506 (2002). "It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Id.*, at 504 (*quoting Marine Power & Equip. Co. v. Dep't of Transp.*, 102 Wn.2d 457, 461 (1984)). *Sackett* cites to RCW 2.04.190 as statutory reinforcement of this authority. RCW 2.04.190 provides that:

> The supreme court shall have the power … generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.

RCW 2.04.190(1987)(emphasis added); *see also State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1 (1928)(upholding constitutionality of RCW 2.04.190) and RCW 2.04.020(1890)(vesting plenary authority in supreme court to determine all matters according to its rules).

The Constitution does not expressly state that prosecutorial decisionmaking is only vested in the Executive Branch. Article III, § 1 merely notes that the executive department consists of several officials, including an "attorney general." Article XI, § 5 directs the legislature to enact laws to provide for electing prosecuting attorneys as public convenience may require. Nothing in either section, however, states that publicly elected prosecutors or attorneys general retain the singular right to prosecute crimes to the exclusion of private complainants. Rather, as described above, the legislature expressly granted to the Supreme Court the right to make rules that affect criminal and civil procedure, as done with JCrR 2.01 and CrRLJ 2.1.

Wash.Const.Article I, § 25 states that prosecutions must occur by information or indictment "as shall be prescribed by law." CrRLJ 2.1(c), like other Supreme Court rules, is law having all the force of a statute since it is a rule of criminal procedure implemented from the broad legislative grant of authority pursuant to RCW 2.04.190. *State v. Currie*, 200 Wash. 699, 707 (1939).[4] The language of the rule permits a judge to evaluate probable cause (as done in every criminal case), weigh the petition against prosecutorial guidelines recommended by the legislature under RCW 9.94A.440, and entertain other equitable considerations, including motivation of the complainant. If, and only if, all factors pass muster, may the court exercise its own discretionary authority to permit the filing of the criminal charge. Once filed, the judicial branch arguably no longer controls the course of the prosecution, though CrRLJ 2.1(c) does not distinguish *initiation* of prosecution from *actual* prosecution.

While Washington's legislature has passed laws outlining how public attorneys may file charges, no authority expressly prohibits private citizens from initiating criminal complaints or prevents the Supreme Court from allowing them to be filed. A restrictive interpretation of the Washington Constitution's Article I, § 25 and Article XI, § 5 as solely granting prosecutorial power to publicly elected attorneys fails to account for the private petition's century-and-a-half longevity and staying power decades before, and over one hundred and twenty years after,

[4] *Currie* notes that the legislature delegated to the Supreme Court the responsibility of making rules relating to pleading, procedure and practice in the courts of the state, and that those rules, such as Rules of the Supreme Court 12 and 17 dealing with timely perfection of appeal, have "all the force of a statute."

statehood. These laws were never held unconstitutional as violating separation of powers doctrine.

Private prosecutions are not new but were part of a common practice in England and America for crime victims for several hundred years. They continue alongside public prosecutions. Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 Suffolk U.L.Rev. 497, 499-500 (2004); Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 Cal.L.Rev. 727, 751 (1988)("Although public prosecution is the norm in most criminal proceedings, this country has a strong and continuing tradition of criminal prosecution by private parties. Private parties, in fact, prosecuted all criminal cases in English and American common law, before the divergence of tort and criminal law and the creation of the public prosecutor's office.") New York permitted private attorneys to prosecute petty offenses. *People ex rel. Allen v. Citadel Mgmt. Co.*, 78 Misc.2d 626, 630 (Crim.Ct.1974). New Jersey has also sanctioned the practice of private prosecution.[5] Virginia's common law allows the use of private prosecutors to assist the public prosecutor. *Cantrell v. Comm.*, 329 S.E.2d 22, 25 (Va. 1985). Other states permitting private prosecutors to participate without consent or

[5]*State v. Storm*, 278 N.J.Super. 287 (App.Div.1994)(private prosecution does not deny due process unless there is a conflict); *State v. Avena*, 281 N.J.Super. 327 (1995); *State v. Leonardis*, 73 N.J. 360, 388 (1977)(noting that "where a prosecutor proposes to drop such a prosecution the possibility of connivance or culpable non-feasance, contrary to the public interest, activates a strong public policy for judicial superintendence of such a decision.")(Conford, P.J.A.D., concurring).

supervision of the district attorney include Alabama, Montana, and Ohio.[6] Georgia permits any person to seek a criminal warrant. ORS 17-4-40.

Pennsylvania's Supreme Court enacted Pa.R.Crim.P. 106, which approves of private criminal complaints for both felonies and misdemeanors, permitting private citizens to submit complaints to the commonwealth's attorney, who is required to approve or disapprove without unreasonable delay. If the attorney disapproves the complaint, she needs to state the reasons for disapproval and return it to the complainant. The complainant can then file the complaint with a judge of a court of common pleas for judicial approval or disapproval. In *Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.,* 550 Pa. 580 (1998), Mr. Buckley, a private citizen, petitioned the trial court to direct the commonwealth attorney to prosecute the charges outlined in his private criminal complaint. The trial court granted his request. The commonwealth appealed, asserting that the order to prosecute over the attorney's objection violated the separation of powers doctrine and that "the courts may never evaluate prosecutorial decisions that are based on policy determinations." *Id*., at 461. The appeals court disagreed, highlighting the importance of Rule 106 "as a necessary check and balance of the prosecutor's decision and protects against the possibility of error." *Id*., citing *Comm. v. Pritchard*, 408 Pa.Super. 221, 233 (1991).

Wisconsin permits a "John Doe proceeding," which begins when a private citizen brings a criminal complaint before a judge. Wis. State. § 968.26. The judge then has discretion to evaluate the complaint, examine witnesses, and issue

[6]*Hall v. State*, 411 So.2d 831, 838 (Ala.Crim.App.1981); *State v. Cockrell*, 309 P.2d 316 (Mont.1957); *State v. Ray*, 143 N.E.2d 484 (Ohio App.1956).

an arrest warrant. *Id*. The statute authorizing John Doe proceedings is deeply rooted in Wisconsin's history, dating back to the 19th century. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-59 (1989), superseded by statute, 1991 Wis. Sess. Laws 88. In *Unnamed Defendant*, the Supreme Court of Wisconsin considered whether the John Doe proceeding violates separation of powers doctrine by granting judges power outside the judicial sphere. *Id*., at 355, 358. According to the court, "[t]he salient aspect of the John Doe proceeding for the purpose of this case – judicial initiation of criminal prosecution – has never appeared to be considered to be inconsistent with the doctrine of separation of powers." *Id*., at 363-64. Further, the notion that "initiation of criminal prosecution is an exclusively executive power in Wisconsin … is erroneous." *Id*., at 358. In his concurrence, Justice Day provided further justification for the validity of the John Doe proceeding by stating, "[c]rime victims should have recourse to the judicial branch when the executive branch fails to respond. This seems to me in keeping with constitutional rights." *Id*., at 372 (Day, J., concurring).

The court also acknowledged that, since John Doe proceedings were permitted at the time of the adoption of the Wisconsin Constitution, the framers likely considered the procedure's constitutionality and found it sound. *Id*., at 362. According to the court, "[a]dded weight to the constitutional validity of this procedure is given by the long and continuous use of the procedure since 1848, and the uniform acquiescence to its constitutionality." *Id*., at 362. The same principle is applied here insofar as Washington's authorization of citizen-initiated

complaints dates back to our State's early history. Other states have similar procedures to CrRLJ 2.1(c).[7]

Judge Toynbee cited to *State v. Rice*[8] and *State ex rel. Banks v. Drummond*, 187 Wn.2d 157 (2016). Neither alters this analysis. When the Island County Board of County Commissioners hired Susan Drummond to defend adopted legislation for the county and offer legal advice, the elected prosecutor Gregory Banks filed a writ of *quo warranto* to void the contract for attorney services and oust Drummond. The Supreme Court held that Banks could seek this relief per RCW 36.27.020(1-3), which made him the "legal adviser" to the county with the obligation of defending it in civil proceedings, as well as per Wash.Const.Art. XI, § 5, concluding that the board could not "unilaterally contract with outside counsel over the objection of an able and willing prosecuting attorney" as it would "unconstitutionally curtail the right of the county's voters to choose their elected official." *Id.*, at 169, 183.

This same "right" does not apply to these facts. *Drummond* concerns internal political squabbles causing a board to seek out alternate legal representation than the elected authority for defense of ordinances passed by, and decisions of, that board, using public funds; it is wholly dissimilar from the right

[7] See N.J. Ct. R. 7:2-2(a)(1)(a citizen can bring a complaint in accordance with a court rule that states that, upon a finding of probable cause by the judge, the judge can issue "[a]n arrest warrant or summons on a complaint charging any offense made by a private citizen."); Ohio Rev. Code Ann. § 2935.09(D)(permitting a citizen to bring an affidavit charging an offense to a judge, prosecutor, or magistrate for a determination as to whether an official complaint should be filed).

[8] For a discussion of *Rice*, see, *supra*, at Section V(B).

of a private citizen to hire her own attorney, using private funds, to petition a court to initiate a criminal prosecution under laws enacted by the State Legislature. Further, in *Drummond,* the prosecutor was "able and willing" to perform the duties desired by the Board, whereas here the LCPAO has been emphatically unable and unwilling to do what must be done. Finally, Banks was the statutorily and constitutionally presumed attorney for his client, the County; here, neither Johnson nor Ware were clients of Mr. Meyer.

B. <u>CrRLJ 2.1(c)(1-7) factors.</u>

See, *supra,* Section IV(K)(g). Additionally, the prosecution standards favoring prosecution <u>mandated</u> filing in this instance:

> Crimes against property/other crimes **<u>will be filed</u>** if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

RCW 9.94A.411(2)(a)(emphasized). The "most plausible defense" asserted by the LCPAO as to Burke, that he was putting Baby Jay out of his misery, is belied by RCW 16.52.011(e) (defining "euthanasia"), the euthanasia guidelines of HSUS, WSPA, and AVMA, the Humane Method of Slaughter Act (Ch. 16.50 RCW), and common sense. The "most plausible defense" raised by Miller is, candidly, unknown and Ms. Johnson does wish to speculate or, naturally, assist in her defense.

Judge Toynbee characterized the "most plausible defense" as one where "the results of the necropsy indicate multiple injuries which contributed to the animal's death; and that these individual injuries were caused by various

persons." CP 330. In this respect, the court abused its discretion and made the same error as that of the LCPAO, disregarding the plain language of RCW 16.52.207, RCW 9.08.070, and RCW 9A.48.090, none of which *requires* that the State prove beyond a reasonable doubt that any particular defendant *killed* Baby Jay. Injury, suffering, pain, damage, taking, leading away, confining, or converting alone suffice. RCW 16.52.207(1) ("suffering or pain"); RCW 9.08.070(1)(a) ("takes, leads away, confines, secretes or converts"); RCW 9.08.070(1)(c) ("injures"); RCW 9A.48.090 ("physical damage").

VIII. CONCLUSION

Citizens dissatisfied with prosecutorial inertia, fearing eclipsing statutes of limitations, and concerns of bias and corruption in the executive branch of government, may find solace in the still surviving avenues by which to initiate criminal prosecution the old-fashioned way. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998)(Stevens, J., concurring)("private persons regularly prosecuted criminal cases" at time of nation's founding). Neither RCW 10.27.030 nor CrRLJ 2.1(c) fail under the constitution.

In both instances, the private citizen asks a judge or judges to exercise discretion consistent with the well-established tradition of bilateral criminal investigation. If a grand jury indicts, then the case returns to the prosecuting attorney to take the case forward. If the district court judge authorizes the filing of a criminal complaint, the case is either privately prosecuted by the complainant or delivered to the prosecuting attorney for further proceedings. In neither instance does the court compel the prosecuting attorney to do anything. The Legislature

and Supreme Court evidently enacted, and maintained, the foregoing check and balance on prosecutorial anemia.

The statute of limitations will run on gross misdemeanor charges April 28, 2018. To ensure that any fruits of this appeal do not wither on the vine, and that charges may be filed before it runs, Ms. Johnson respectfully urges expedited review of this consolidated appeal. As to Mr. Burke's appeal, the statute of limitations on felony animal cruelty will not run until April 28, 2019.

Dated this September 22, 2017

ANIMAL LAW OFFICES

Adam P. Karp, WSB No. 28622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2017, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

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